

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEFFREY¹ B.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. 3:20-cv-05383-BAT

**ORDER REVERSING THE
COMMISSIONER’S FINAL DECISION**

Plaintiff appeals the ALJ’s finding he is not disabled. The ALJ found plaintiff’s status-post foot injury with multiple surgeries and nerve dysfunction, lumbago, and adjustment disorder with depressed and anxious mood are severe impairments that did not meet the Listings and although plaintiff lacked the residual functional capacity to perform his past work, he could perform other work in the national economy. Tr. 1290-1330.

Plaintiff contends the ALJ failed to address Listing 1.03 at step three and misevaluated the medical opinion evidence, the lay evidence, and consequently erred at step five. Dkt. 21 at 1. For the reasons below the Court **REVERSES** the Commissioner’s final decision and

¹ Plaintiff’s first name is spelled “Jeffery” throughout most of the administrative record, but is spelled “Jeffrey” on the docket.

1 **REMANDS** the for further administrative proceedings under sentence four of 42 U.S.C. §
2 405(g).

3 **DISCUSSION**

4 **A. Step three**

5 Plaintiff argues the ALJ erroneously failed to address Listing 1.03 at step three. The
6 record establishes the ALJ did not discuss Listing 1.03. Although the Commisioner concedes the
7 ALJ so failed, he argues the Court can reasonably infer the ALJ reasonably concluded plaintiff
8 did not meet or equal the requirements of the Listing. Dkt. 22 at 2.

9 The Commissioner's argument misapprehends the ALJ's obligations and this Court's role
10 on review. The ALJ is required at step three to consider whether one or more of a claimant's
11 impairments meet or medically equal an impairment listed in Appendix 1 to Subpart P of the
12 regulations. "The listings define impairments that would prevent an adult, regardless of his age,
13 education, or work experience, from performing *any* gainful activity, not just 'substantial gainful
14 activity.'" *Sullivan v. Zebley*, 493 U.S. 521, 532 (1990) (emphasis in original; citations omitted).
15 The Court does not in the first instance make a step three determination in order to fulfill an
16 obligation reserved to the ALJ.

17 The Court is mindful in some instances, the ALJ's failure to fulfill her obligations is
18 harmless. This is not such an instance. The medical record establishes plaintiff's post foot injury
19 with multiple surgeries and nerve dysfunction are significant and severe. It cannot be reasonably
20 concluded the record plainly establishes plaintiff retains the ability to ambulate effectively and
21 his conditions thus fail to meet or equal the requirements of Listing 1.03. The Commissioner
22 contends Dr. Vu opined plaintiff did not meet the Listing, and suggests the ALJ found plaintiff
23 did not meet the Listing based upon Dr. Vu's opinions. The argument does not track with the fact

1 the ALJ gave only partial weight to Dr. Vu's opinions because the ALJ found plaintiff is more
2 limited than Dr. Vu assessed. Tr. 1308 ("The overall record shows the claimant is more limited
3 than Dr. Vu assessed.").

4 Because the ALJ failed to properly address Listing 1.03 the ALJ on remand shall
5 reassess whether plaintiff meets or equals the requirements of the Listing. As the case shall be
6 remanded regarding Listing 1.03, the Court need not address plaintiff's arguments about the ALJ
7 evaluation of medical evidence about his physical limitations as they are tied to the reevaluation
8 of Listing 1.03. Thus on remand the ALJ shall, as part of her assessment of Listing 1.03, reassess
9 the medical evidence regarding plaintiff's physical problems.

10 **B. Medical Evidence Regarding Mental Limitations**

11 **1. Aaron Hunt, M.D.**

12 Dr. Hunt performed a mental IME in August 2012. Tr. 868-907. The ALJ noted Dr.
13 Hunt opined plaintiff's symptoms did not preclude work and return to work likely would
14 improve plaintiff's overall condition. Tr. 1303, 1308-09. Plaintiff argues the ALJ failed to
15 address Dr. Hunt opinion plaintiff's medications needed to be increased and plaintiff could
16 benefit from short-term psychotherapy. Tr. 875. The ALJ is authorized to weigh the evidence
17 and plaintiff fails to show the ALJ harmfully erred.

18 **2. Edwin Hill, Ph.D.**

19 Dr. Hill, plaintiff's treating psychologist, completed a form opinion in September 2013
20 describing plaintiff's symptoms and limitations. Tr. 976-79. The ALJ summarized Dr. Hill's
21 findings and rejected the doctor's opinions. Tr. 1305, 1309-10.

22 First, the ALJ rejected Dr. Hill's opinions because the doctor began treating plaintiff in
23 2012 but opined plaintiff's limitations existed as early as 2006. Tr. 1310. Ostensibly the ALJ

1 found Dr. Hill gave an opinion that could not be supported. However, what Dr. Hill actually
2 noted is plaintiff suffers from major depressive disorder, anxiety disorder and personality “due to
3 sequelae from August 17 2006” not that plaintiff current symptoms actually existed in 2006. Tr.
4 1092.

5 The ALJ also rejected Dr. Hill’s opinions as based upon plaintiff’s self-reports. Dr. Hill
6 treated plaintiff extensively and did not find he was not credible or malingering. Thus the ALJ
7 erred in rejecting the doctor’s opinions as relying too much on plaintiff’s reports. The ALJ also
8 noted Dr. Hill did not reference the secondary gain motivation noted by Jeffrey Okey, Ph.D. in
9 his examination report. Tr. 1310. But Dr. Okey did not opine plaintiff was in fact malingering.
10 Rather he found plaintiff’s MMPI elevated scores sometimes were present in cases of secondary
11 gain. This equivocal opinion cannot reasonably support a finding that plaintiff in fact is a
12 malingerer. The Court accordingly concludes the ALJ’s determination to reject Dr. Hill’s opinion
13 is not supported by substantial evidence

14 **3. Jeffrey Okey, Ph.D.**

15 Dr. Okey examined plaintiff in January 2013. Tr. 1071-75. The ALJ rejected Dr. Okey’s
16 opinions finding the doctor failed to provide a function-by-function assessment of plaintiff’s
17 capabilities, and his opinion plaintiff was “functionally disabling” is a finding reserved to the
18 Commissioner. Tr. 1309. The ALJ erred. The ALJ must assess a claimant’s RFC on a function-
19 by-function basis, unless the ALJ relies on medical opinions defining relevant functional
20 limitations. *Lind v. Astrue*, 370 Fed.Appx. 814, 817 (9th Cir. 2010) (“The ALJ is not required to
21 repeat the function-by-function analysis [provided in the record].”). But there is no requirement a
22 doctor must perform a function-by-function analyses for the doctor’s opinion to be credited. To
23 the extent the ALJ required more specificity, the ALJ should have developed the record, not

1 simply reject the opinion. As to findings reserved to the Commissioner, while the ALJ need not
2 accept a medical opinion of “disability” an opinion about disability opinion does not alone render
3 the doctor’s findings invalid.

4 The ALJ also found Dr. Okey examined plaintiff after he had been receiving a few
5 months of treatment and recommended an additional three months of treatment (Tr. 1074), and
6 this duration would not satisfy the Social Security Act’s definition of disability. This finding
7 disregards the fact that plaintiff has had extended mental health treatment and problems.

8 Lastly, the ALJ noted Dr. Okey’s concerns about the validity of the testing in light of
9 Plaintiff’s elevated responses as well as Dr. Okey’s comments regarding Plaintiff’s disability
10 conviction. Tr. 1309. However, Dr. Okey did not find plaintiff was not severely limited because
11 he was exaggerating his symptoms. To the contrary the doctor opined plaintiff was very
12 impaired. Hence the ALJ’s finding is unsupported. The Court accordingly finds the ALJ erred in
13 rejecting Dr. Okey’s opinions.

14 **C. Lay Evidence**

15 Plaintiff submitted numerous lay witness statements to the ALJ, during both the original
16 proceedings and the remand proceedings. *See* Tr. 207-14, 265-304, 319-21, 1755-69. The ALJ
17 summarized fourteen of the statements at length, and gave some weight to certain opinions the
18 ALJ deemed were consistent with the overall record, but noted some statements conflicted with
19 plaintiff’s testimony or the medical record, or were not probative as to Plaintiff’s RFC and the
20 ALJ’s disability determination. Tr. 1310-12. The ALJ also noted one of the lay witnesses had
21 limited interaction with Plaintiff, which rendered his statements less probative. Tr. 1311. The
22 ALJ did not discuss five lay statements that were submitted in 2016. Tr. 1755-1769.

1 An ALJ's reasons to discount a lay statement must be germane. *See Dodrill v. Shalala*,
2 12 F.3d 915, 919 (9th Cir. 1993) ("If the ALJ wishes to discount the testimony of the lay
3 witnesses, he must give reasons that are germane to each witness."). Inconsistency between a lay
4 statement and the medical evidence and/or the claimant's testimony are germane reasons to
5 discount a lay statement. *See Carmickle v. Comm'r of Social Sec. Admin.*, 533 F.3d 1155, 1164
6 (9th Cir. 2008) (activities); *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005) (medical
7 evidence). Thus, because the ALJ reasonably found some lay statements to be inconsistent with
8 plaintiff's testimony and/or the medical record, the ALJ provided germane reasons to discount
9 them and the Court affirms that portion of the ALJ's decision.

10 Although the ALJ failed to provide any reason to discount five lay statements submitted
11 in 2016, those statements mirror Plaintiff's own allegations, which the ALJ discounted and
12 Plaintiff does not challenge that reasoning. *See* Tr. 1755, 1758, 1761, 1764, 1767. Because the
13 ALJ's reasoning with respect to Plaintiff's testimony applies with equal force to the lay
14 testimony, and Plaintiff has not challenged that line of the ALJ's reasoning, the Court finds no
15 harmful error in the ALJ's failure to address the 2016 lay statements. *See Valentine v. Comm'r*
16 *of Social Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009) (holding that because "the ALJ
17 provided clear and convincing reasons for rejecting [the claimant's] own subjective complaints,
18 and because [the lay witness's] testimony was similar to such complaints, it follows that the ALJ
19 also gave germane reasons for rejecting [the lay witness's] testimony").

20 **D. Step five**

21 Because the ALJ erred at step three and in evaluating the medical evidence above, the
22 ALJ on remand must based upon a reassessment of Listing 1.03 and the medical evidence
23 regarding plaintiff's mental limitations proceed to step five as appropriate.

1 For the foregoing reasons, the Commissioner's decision final decision is **REVERSED**
2 and this case is **REMANDED** for further administrative proceedings under sentence four of 42
3 U.S.C. § 405(g). On remand the ALJ shall make appropriate findings at step three regarding
4 Listing 1.03, reassess the opinions of Drs. Okey, and Hill, develop the record and reassess
5 plaintiff's RFC as needed and proceed to step five as appropriate.

6 DATED this 28th day of October, 2020.

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BRIAN A. TSUCHIDA
Chief United States Magistrate Judge